86-527

NO.

Supreme Court, U.S.
FILED
SEP 5 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

JANE R. FERGUSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

LOWELL H. BECRAFT, JR.
209 Lincoln Street
Huntsville, AL 35801
(205) 533-2535
Attorney for Petitioner
Jane R. Ferguson

Dated: August 29, 1986

QUESTIONS PRESENTED FOR REVIEW

ISSUE 1:

Did the District Court commit error in failing to dismiss the indictment rendered herein on the grounds that the sixteenth Amendment, the federal income tax amendment which is the basis of the congressional power to tax the "incomes" of private individuals, was never ratified and made a part of the Untied States Constitution?

ISSUE 2:

Is Section 205, revised Statutes of the United States, which authorized the United States Secretary of State to proclaim and certify that an amendment to the U.S. Constitution had been adopted, unconstitutional as conferring upon such executive branch officer an undelegable power of the legislative branch?

---

1. The caption in the style of this writ contains the names of all the parties to this proceeding, such parties being Jane R. Ferguson and the United States of America.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

JANE R. FERGUSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

The Petitioner, Jane R. Ferguson, herein Ferguson, requests that a Writ of Certiorari issue to review the opinion of the United States Court of Appeals for the Seventh Circuit, which affirmed the conviction of Ferguson on eight separate counts of various violations of laws related to income taxation.

Ferguson's appeal to this Honorable Court involves solely a challenge to the ratification in February, 1913, of the Sixteenth Amendment to the United States Constitution, which alleged amendment authorized Congress to impose a direct tax known as the income tax without the same being subject to the regulations concerning apportionment as contained in the U.S. Constitution. Ferguson's argument is supported by some, but not all, of the evidence related to the ratification, or lack thereof, of the challenged amendment, but such evidence is clearly sufficient to show that the amendment in question was not ratified by the requisite number of states and further that the amendment was fraudulently

and unlawfully certified as having been ratified.

The question thus presented to this Court is of monumental significance and challenges the lawful power of Congress to collect an income tax in this nation in the method employed today. The personal and corporate income tax imposed by Title 26, U.S.C., is entirely dependent upon the Sixteenth Amendment, which is challenged by Ferguson. However, the tax receipts received by the federal government through the challenged tax could still be collected notwithstanding the deletion of the Sixteenth Amendment from the U.S. Constitution if Congress imposed said tax by the constitutional regulation of apportionment.

To date, the question presented for review has been considered by the U.S. Court of Appeals for the Seventh and Ninth Circuits as being a political question upon which such courts could not rule. However, Ferguson argues that this question clearly presents a judicial question plainly falling within the confines of the definition of a judicial question, particularly as noted by this Court in Goldwater v. Carter, 444 U.S. 996, 100 S.Ct. 533 (1979).

TABLE OF CONTENTS

	Page
Questions Presented For Review	
Peition For Writ of Certiorari	
Table of Contents	i
Table of Authorities	ii
Opinions Below	1
Jurisdiction	2
Constitutional and Statutory Provisions Involved	3
Statement of the Case	7
Reasons For Granting This Writ	25
Argument	29
Conclusion	53
Appendix A	A1
Appendix B	A19

TABLE OF AUTHORITIES

Page

Alabama v. Manley,
441 So.2d 864 (Ala., 1983) 30

American School of Magnetic Healing v. McAnnulty,
187 U.S. 94, 23 S.Ct. 33 (1902) 42

Baker v. Carr,
369 U.S. 186, 82 S.Ct. 691 (1962) 27

Bowsher v. Synar,
54 Law Week 5064 (U.S.S.Ct., July 7, 1986) 28,29,52

Butterworth v. Hoe,
112 U.S. 50,
5 S.Ct. 25 (1884) 41

Carnegie Institute of Medical Laboratory Technique, Inc. v. Approving Authority,
213 N.E.2d 225 (Mass., 1965) 38

Carter v. Carter Coal Co.,
298 U.S. 238, 56 S.Ct. 855 (1936) 51

Collier v. Frierson,
24 Ala. 100 (1854) 30

County Commissioners of Washington County v. Baker,
141 Md. 623, 119 A. 461 (1922) 38

Crawford v. Gilchrist,
64 Fla. 41, 59 So. 963 (1912) 31

Cudihee v. Phelps,
76 Wash. 314, 136 P. 367 (1913) 34

Dillon v. Gloss,
256 U.S. 368, 41 S.Ct. 510
(1921) 46,47,49

Durfee v. Harper,
22 Mon. 354, 56 P. 582 (1899) 33

Field v. Clark,
143 U.S. 649, 12 S.Ct. 495
(1892) 43,47,50

Fugua v. Davidson County,
189 Tenn. 645, 227 S.W.2d 12
(1950) 39

Gardner v. Collector,
73 U.S. 499 (1868) 43

Goldwater v. Carter,
444 U.S. 996, 100 S.Ct. 533
(1979) 28

Graham v. Jones
198 La. 507, 3 So.2d 761
(1941) 33

Hammond v. Clark,
136 Ga. 313, 71 S.E. 479
(1911) 31

Hillsborough County v. Temple Terrace Assets Co., 111 Fla. 368, 149 So. 473 (1933) 37

In re Denny, 156 Ind. 104, 59 N.E. 359 (1901) 31

In re Jaegle, 83 N.J.L. 313, 85 A. 214 (1912) 39

In re Kornbluh, 134 N.J.L. 529, 49 A.2d 255 (1946) 39

Kadderly v. Portland 44 Ore. 118, 74 P. 710 (1903) 34

Kendall v. United States, 37 U.S. (12 Pet.) 524 (1838) 41

Kent v. Dulles, 357 U.S. 116, 78 S.Ct. 1113 (1958) 42

Koehler v. Hill, 60 Iowa 543, 14 N.W. 738, reh. den., 15 N.W. 609 (1883) 31

Leser v. Garnett, 258 U.S. 130, 42 S.Ct. 217 (1922) 47,48

Loring v. Young,
239 Mass. 349,
132 N.E. 65 (1921) 33

Lovett v. Ferguson,
10 S.D. 44,
71 N.W. 765 (1897) 34

Marbury v. Madison,
5 U.S. (1 Cranch) 137
(1803) 41

McBee v. Brady,
51 Idaho 761,
100 P. 97 (1909) 31

Mississippi v. Johnson,
71 U.S. (4 Wall.) 475
(1866) 42

Moog v. Randolph,
77 Ala. 597 (1884) 35

Moore v. Neece,
80 Neb. 600,
114 N.W. 767 (1908) 38

Noble v. Union River
Logging R. Co.,
147 U.S. 165,
13 S.Ct. 271 (1893) 42

Oakland Paving Co. v. Hilton,
69 Cal. 479, 11 P. 3 (1886) 31

Oregon Business and
Tax Research, Inc. v. Farrell,
176 Ore. 532, 159 P.2d 822
(1945) 39

Panama Refining Co. v. Ryan,
239 U.S. 388,
55 S.Ct. 241 (1935) 50

People v. Luederes,
283 Ill. 287, 119 N.E.
339 (1918) 38

Powell v. McCormack,
395 U.S. 486, 89 S.Ct.
1944 (1969) 27

Rhode Island v. Palmer,
253 U.S. 350, 40 S.Ct. 486
(1920) 44

Rice v. Palmer,
78 Ark. 432, 96 S.W. 396
(1906) 30

Rode v. Phelps,
80 Mich. 598, 45 N.W. 493
(1890) 38

Rogers v. State,
72 Ark. 565, 82 S.W. 169
(1904) 37

Schecter Poultry Corp. v.
United States,
295 U.S. 495, 55 S.Ct. 837
(1935) 50

State v. Babcock,
17 Neb. 188, 22 N.W. 372
(1885) 33

State v. City of Sanford, 113 Fla. 750, 152 So. 193 (1934) 37

State v. Davis, 20 Nev. 220, 19 P. 894 (1888) 34

State v. Foraker, 46 Ohio St. 677, 23 N.E. 491 (1890) 34

State v. Laiche, 105 La. 84, 29 So. 700 (1901) 38

State v. Marcus, 160 Wis. 354, 152 N.W. 419 (1915) 34

State v. McClelland, 18 Neb. 236, 25 N.W. 77 (1885) 38

State v. Powell, 77 Miss. 543, 27 So. 927 (1900) 33

State v. Skaley, 108 Fla. 506, 146 So. 544 (1933) 37

State v. State Board of Equalization, 107 Okl. 118, 230 P. 743 (1924) 34

State v. Swan, 7 Wyo. 166, 51 P. 209 (1897) 39

State v. Wendler,
94 Wis. 369, 68 N.W. 759 (1896) 39

Town of South Ottawa v.
Perkins
94 U.S. 260 (1877) 43

United States v. Ballin,
144 U.S. 1, 12 S.Ct. 507
(1892) 44

United States v. Ferguson,
615 F.Supp. 8 (S.D. Ind.,
(1985) 9

United States v. Ferguson,
793 F.2d 828 (7th Cir.,
1986) 26,27,28

United States v. Foster,
789 F.2d 457 (7th Cir., 1986) 25

United States v. Schurz,
102 U.S. 378 (1880) 41

United States v. Stahl,
792 F.2d 1438 (9th Cir.,
1986) 26,27,28

United States v. Thomas,
611 F.Supp. 881 (N.D. Ill.,
1985) 25

United States v. Thomas,
788 F.2d 1250 (7th Cir., 1986) 25

United States v. Wojtas,
611 F.Supp. 118 (N.D. Ill.,
1985) 25

OPINIONS BELOW

The opinion below in the U.S. District Court is published at 615 F.Supp 8 (S.D., Ind., 1985), which opinion did not concern the issue presented herein. The opinion of the U.S. Court of Appeals for the Seventh Circuit, which did address this question, is published at 793 F.2d 828 (7th Cir., 1986); see Appendix. Petition for rehearing was denied on July 7, 1986.

JURISDICTION

Jurisdiction of the trial court in this cause was pursuant to 18 U.S.C., § 3231. The jurisdiction of the appellate court was pursuant to 28 U.S.C., § 1291. The opinion in the appellate court was rendered on June 12, 1986, and Ferguson's timely filed petition for rehearing was denied on July 7, 1986. this court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article V, U.S. Constitution:

> "The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the application of the Legislature of two thirds of the several States, shall call a convention for proposing amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by convention in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate."

Sixteenth Amendment, U.S. Constitution:

> "The Congress shall have power to lay and collect taxes on incomes, from whatever source

derived, without apportionment among the several States, and without regard to any census or enumeration."

Section 205, Revised Statutes of the United States:

"Whenever official notice is received at the Department of State that any amendment proposed to the Constitution of the United States has been adopted, according to the provisions of the Constitution, the Secretary of State shall forth with cause the amendment to be published in the newspapers authorized to promulgate the laws, with his certificate, specifying the States by which the same may have adopted, and that the same has become valid, to all intents and purposed, as a part of the Constitution of the United States."

26 U.S.C., Section 7203:

"Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of Section 6015), keep any records, or supply any information, who

willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000 or imprisoned not more than one year, or both, together with the costs of prosecution."

26 U.S.C., Section 7205:

"Any individual required to supply information to his employer under Section 3402 who willfully supplies false or fraudulent information, or who willfully fails to supply information thereunder which would require an increase in the tax to be withheld under Section 3402, shall, in lieu of any other penalty provided by law, (except the penalty provided in Section 6682), upon conviction thereof, be fined not more than $500, or imprisoned not more than one year, or both.

18 U.S.C., Section 287:

"Whoever makes or presents to any person or officer in the civil, military, or naval service of the United States, or to any department or agency thereof, any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or

fraudulent, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

STATEMENT OF THE CASE

A. PROCEEDING IN THE DISTRICT COURT

On or about November 15, 1984, Jane R. Ferguson, was indicted in an 8 count indictment. Count 1 or the indictment charged that Ferguson committed an offense cognizable under 26 U.S.C. § 7203 in the tax year 1980. Counts 2 and 3 charged similar offenses for the tax years 1981 and 1982. Counts 4 and 5 charged Ferguson with offenses cognizable under 26 U.S.C. § 7205 for the submission of 2 allegedly false withholding allowance certificates. Count 6 charged Ferguson with an offense cognizable under 18 U.S.C. § 287 arising out of an allegedly false amended income tax return. Counts 7 and 8 charged Ferguson with offenses cognizable

under 18 U.S.C. § 287 for submission of 2 allegedly false claims for refunds of income taxes. In response to the indictment, Ferguson filed a Motion to Dismiss the same, which motion charged that the 16th Amendment to the U.S. Constitution, the alleged federal income tax amendment, had never been ratified and made a part of the U.S. Constitution. Before trial, the District Court heard such motion but denied the same.

On January 14, 1985, the trial of this cause was scheduled. The Court heard and received evidence related to Ferguson's Motion to Dismiss on January 14 and 15. After denying her Motion to Dismiss, a bench trial was conducted where the prosecution presented its case. At the conclusion

of the prosecution's case, Ferguson moved for an acquittal, but the District Court denied this motion. Immediately thereafter, the defense rested and presented no evidence.

On February 12, 1985, after both the prosecution and defense had briefed the issue of whether the prosecution had presented a prima facie case, the District Court found Ferguson guilty on all counts; see United States v. Ferguson, 615 F. Supp. 8 (S.D. Ind., 1985). On April 15, 1985, Ferguson was sentenced but granted bond pending appeal.

On June 12, 1986, the United States Court of Appeals for the Seventh Circuit affirmed Ferguson's conviction; see United States v. Ferguson, 793 F.2d 828 (7th Cir.,

1986). Ferguson filed a petition for rehearing with the Seventh Circuit on or about June 24, 1986, but said petition was denied on July 7, 1986. Thereafter, Ferguson was incarcerated.

B. STATEMENT OF FACTS PERTINENT FOR THIS WRIT

The only issue being raised in this writ concerns the alleged ratification, or lack thereof, of the Sixteenth Amendment to the U.S. Constitution. This issue was raised in the trial court by Ferguson moving to dismiss the indictment on the grounds that the challenged amendment had not been ratified by the requisite number of states and further that Secretary of State Philander Knox had unlawfully and fraudulently certified that said amendment had been ratified.

In support of said motion, Ferguson presented certified copies of documentation obtained from the National Archives in Washington, D.C., as well as certified copies of the legislative journals from the States of Kentucky, Illinois, Gerogia, California and Missouri.

On July 12, 1909, the United States Congress adopted Senate Joint Resolution 40, which proposed to the various state legislatures of the States of our nation the following described amendment to the U.S. Constitution:

> "Article XVI. The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration."

Subsequently, on July 27, 1909,

the same Congress adopted Senate Concurrent Resolution 6, which requested the President to send certified copies of S.J.R. 40 to the governors of all states. Pursuant to this resolution, Philander C. Knox, Secretary of State, transmitted to each governor such certified copy of the resolution proposing the amendment. Between August, 1909, and February 15, 1913, the various state legislatures took action in reference to the proposed amendment.

In 1910, the legislature of Kentucky had pending before it the proposed constitutional amendment. On January 26, 1910, the Kentucky House adopted House Resolution 4, a resolution to adopt the amendment. On February 8, 1910, House Resolution 4

was considered by the Kentucky Senate, but it was rejected by a vote of 22 to 9. After the defeat of this first resolution, the House attempted again to secure the adoption of this amendment and enacted on February 23, 1910, House Resolution 20, which was another resolution adopting the proposed amendment. On March 15, 1910, the Kentucky Senate refused to consider this second resolution. The Kentucky Senate never did ratify the Congressional resolution proposing the 16th Amendment.

On February 9, 1910, the Illinois Senate adopted Senate Joint Resolution 7; this resolution omitted the preamble of the Senate Joint Resolution 40 of the U.S. Congress. Thereafter, on March 1, 1910, the

Illinois House adopted this resolution. In effect, the legislature of Illinois adopted a resolution different from that proposed by Congress; the Illinois resolution completely omitted the preamble of the Congressional resolution, it failed to capitalize the word "States" as it appears in the Congressional resolution, and further, the Illinois resolution amended the last word in the Congressional amendment, the word 'enumeration," and changed it to "renumeration."

In 1909, the Senate of Georgia had tabled Senate Resolution 23, which was such a resolution to accept the amendment. In the next year, on July 11, 1910, the Georgia Senate may, or may not, have adopted either this

resolution, or another one numbered 38. However, notwithstanding which resolution was adopted by the Georgia Senate, when that resolution appeared upon the Georgia House floor on July 12, 1910, another resolution was offered as a substitute and the House adopted the substitute resolution. Thus, the legislative journals of Georgia reveal that neither house adopted a resolution which was likewise accepted by the other house. But, brushing aside the problem concerning a lack of concurrence by both houses of the Georgia legislature in the same resolution, the resolution of Georgia which was sent to Washington clearly reveals that the amendment proposed by Congress was itself amended by the Georgia

legislature. The preamble of the Congressional resolution was modified; in the body of the amendment itself, the word "levy" was substituted for the word "lay"; the word "incomes" was amended to "income"; the word "source" was changed to "sources"; and commas were omitted from the amendment. Plainly, the Georgia legislature did not concur with the amendment proposed by Congress.

On January 23, 1911, the California Senate adopted Senate Joint Resolution 2, which was an amended version of the amendment proposed by Congress. After this resolution was adopted, it was transmitted to the California House. On January 31, 1911, the California House may, or may not, have adopted the resolution; the

problem with the vote in the California House is that the vote on the resolution doesn't appear in the House journal notwithstanding the fact that the Constitution of the State of California compels the showing of votes in the journals. Still, the amendment allegedly accepted by the California legislature was not the one proposed by Congress. The Congressional preamble was substantially changed; the first word of the amendment, the word "The", was deleted as were commas in the body of the amendment; the word "States" in the Congressional resolution was not capitalized in the California resolution; and the last phrase of the Congressional amendment, the phrase "census or enumeration" was amended to

"census enumeration." Thus, the California legislature failed to adopt the amendment proposed by Congress.

On March 3, 1911, Senate Joint and Concurrent Resolution 8, an amended version of the resolution adopted by Congress, was adopted by the Missouri Senate. The Senate resolution was then transmitted to the Missouri House and on March 16, 1911, the House substituted its own resolution regarding the 16th Amendment for the Senate resolution and adopted the amended resolution. The amended resolution was then transmitted to the Senate, where on the following day, it is alleged that the Senate adopted an amended title to the resolution. However, the Senate journal reveals no vote on this action

notwithstanding the command of the Missouri Constitution to record such vote. Whether or not the same resolution was adopted by both Missouri houses, the resolution sent to Washington was an amended version of what Congress proposed. The Missouri resolution omitted the preamble of the Congressional resolution; the words "Congress" and "States" as appeared in the Congressional resolution were not capitalized; and the word "lay" as it appeared in the Congressional resolution was amended to the word "levy." Clearly, the State of Missouri accepted a resolution different from what proposed by Congress.

In February, 1913, the

legislature of Wyoming apparently adopted the resolution proposed by Congress; on February 3, 1913, the Governor of Wyoming sent to Secretary of State Philander Knox a telegram informing Knox of the purported adoption of the 16th Amendment by Wyoming. The following day, Knox responded by telegram and informed the Governor that a certified copy of the Wyoming resolution had to be sent to him in order to comply with section 205 of the Revised Statutes. While Knox demanded such a certified copy of the Wyoming resolution, he failed to make a similar demand of the legislature of Minnesota, which never sent anything to Knox. Knox counted Minnesota as a state which ratified the 16th Amendment nonetheless.

By early February, 1913, Secretary Knox had many state resolutions concerning the 16th Amendment in his possession. However, his office reviewed these resolutions and determined that sever problems existed.

On February 15, 1913, the Solicitor of the State Department prepared a memorandum explaining the problems concerning the alleged ratification of the 16th Amendment and sent the same to Knox. The Solicitor noted that Minnesota had sent no certified copy of any resolution its legislature adopted to the State Department. He further noted:

> "In the certified copies of the resolutions passed by the legislatures of the several states ratifying the proposed 16th amendment, it appears that

> only four of these resolutions (those submitted by Arizona, North Dakota, Tennessee, and New Mexico) have quoted absolutely accurately and correctly the 16th Amendment as proposed by Congress. The other thirty-three resolutions all contain errors either of punctuation, capitalization, or wording. Minnesota, it is to be remembered, did not transmit to the Department a copy of the resolution passed by the legislature of that state. The resolutions passed by twenty-two states contain errors only of capitalization or punctuation, or both, while those of eleven states contain errors in the wording."

Thereafter, the Solicitor noted the amendments to the 16th Amendment made by the States of Illinois, Georgia, California and Missouri shown above. In addition to other amendments made by other states, he noted that the Oklahoma legislature had amended the phrase "without regard to any census or enumeration" as it

appeared in the Congressional amendment to read "from any census or enumeration."

In the same memo, the Solicitor demonstrated his knowledge of the legal maxim that legislative bodies must concur completely with each other in order to enact any law. He noted that this same principle applies to the adoption of an amendment to the U.S. Constitution, wherein the states must concur precisely with the amendment proposed by Congress. The Solicitor's words are as follows:

> "Furthermore, under the provisions of the Constitution a legislature is not authorized to alter in any way the amendment proposed by Congress, the function of the legislature consisting merely in the right to approve or disapprove the proposed amendment."

On March 4, 1909, the U.S.

Congress adopted a revised criminal code for the federal government; one section of this code, found at 35 Stat. 1095, made it penal for anyone to make false, fictitious or fraudulent statements to any agency of the federal government. Another section, found at 35 Stat. 1107, made it penal for any public official to make a written false certification; both of these laws are now found at 18 U.S.C., sections 1001 and 1018. Secretary of State Knox violated both of these laws when he, on February 25, 1913, falsely and fraudulently certified that 38 states had adopted the 16th Amendment when in fact they had not.

REASONS FOR GRANTING THE WRIT

The question presented herein has, to date, been the subject of several decisions by the Courts of Appeals for the Seventh and Ninth Circuits, as well as District Courts in the Northern District of Illinois. The first published opinion regarding this issue was rendered in United States v. Wojtas, 611 F. Supp. 118 (N. D. Ill., 1985), wherein the District Court held this issue to be a political one; the same rationale was followed in United States v. Thomas, 611 F. Supp. 881 (N.D. Ill., 1985). Subsequently, in United States v. Foster, 789 F.2d (7th Cir., 1986), and United States v. Thomas, 788 F.2d 1250 (7th Cir., 1986), this issue was held to be both a political question and

one which could not be addressed because too much time had passed since the adoption of the challenged amendment and the courts had relied upon the validity of the amendment. It must be noted that the above cases, all in the Seventh Circuit, raised this issue after it was raised by Ferguson, and such cases had little or no evidence presented in support of the issue and argued the issue obliquely on appeal.

There exist two cases wherein the issue presented herein has been adequately supported by proper evidence as well as fully argued on appeal. These cases are United States v. Ferguson, 793 F.2d 828 (7th Cir., 1986), and United States v. Stahl, 792 F.2d 1438 (9th Cir., 1986). In these

cases, full evidence and arguments were presented, and the litigants named above were attempting to rely upon both Ferguson and Stahl to "blaze the trial," so to speak, on this issue. However, the cases which were relying upon Ferguson and Stahl were decided first and thus became precedence for deciding Ferguson and Stahl.

Ferguson and Stahl were primarily decided on the basis that the issue regarding the ratification of the Sixteenth Amendment is strictly a political issue. However, the paramount cases on the issue of what is a political question are Baker v. Carr, 369 U.S. 186, 82 S.Ct. 691 (1962), Powell v. McCormack, 395 U.S. 486, 89 S.Ct. 1944 (1969), and

Goldwater v. Carter, 444 U.S. 996, 100 S.Ct. 533 (1979). Gauged in accordance to the three criteria for determining whether a question is political as set forth in Goldwater, the question here is not political but one which is judicial. Thus, both Ferguson and Stahl are in conflict with decisions of this Court.

The issue of whether Section 205 of the Revised Statutes is unconstitutional on separation of powers grounds was raised but not decided in the court below. The very recent case of Bowsher v. Synar, 54 Law Week 5064 (U.S. S.Ct., July 7, 1986), held that legislative officials could not exercise executive department powers. In the instant case, the question presented concerns

the exercise of legislative powers by an official in the executive branch. With the recent decision in Bowsher, a decision on the same issue as presented in Bowsher from the viewpoint of the executive branch is essential to fully develop the separation of powers doctrine.

For the reason that this case presents the unsettling question concerning the ratification of an important amendment to the U.S. Constitution, as well as an important corollary to the separation of powers doctrine, this Court should grant the writ sought herein.

ARGUMENT

I. State courts consider challenges to the adoption of amendments to state constitutions as presenting a judicial

question.

Examples of state courts which consider the question of amending state constitutions, and controversies arising therefrom, as judicial questions, are numerous. Perhaps one of the first challenges made on this ground occurred in Collier v. Frierson, 24 Ala. 100 (1854). Here, the Alabama Supreme Court held that the state constitution must be followed when it is being amended, and if an amendment is not enacted in accordance with the law, the amendment will not be considered as a part of the constitution; see also Alabama v. Manley, 441 So.2d 864 (Ala., 1983). The Arkansas Supreme Court also considers this issue as a judicial one; see Rice v. Palmer, 78 Ark. 432,

96 S.W. 396 (1906). And the same applies in California; see Oakland Paving Co. v. Hilton, 69 Cal. 479, 11 P. 3 (1886).

In Crawford v. Gilchrist, 64 Fla. 41, 59 So. 963 (1912), the Florida Supreme Court enjoined the publication of a proposed amendment to the state constitution. In Hammond v. Clark, 136 Ga. 313, 71 S.E. 479 (1911), the Georgia Supreme Court held that the Governor's proclamation that an amendment was adopted was not conclusive upon the courts. In McBee v. Brady, 51 Idaho 761, 100 P. 97 (1909), the court struck an amendment apparently adopted, as also occurred In re Denny, 156 Ind. 104, 59 N.E. 359 (1901).

In Koehler v. Hill, 60 Iowa 543,

14 N.E. 738, reh. den., 15 N.W. 609 (1883), a situation similar to the one presented herein occurred. The Iowa Constitution at the time required a proposed amendment to be adopted by two separate sessions of the legislature. One session adopted a proposed amendment, but the succeeding session adopted one which was minutely different. Notwithstanding a popular vote in favor of the amendment, the Iowa Supreme Court struck the amendment due to the fact that the two sessions of the legislature had not concurred in the same precise amendment.

Perhaps one of the best cases dealing with this particular subject and the duty required of the court to strike an amendment which was

improperly adopted is Graham v. Jones, 198 La. 507, 3 So.2d 761 (1941), which voided an amendment which was improperly enacted. In doing so, the court held that its action in voiding an imporperly adopted amendment would not itself harm the government. If the government was so harmed, it would be the fault of the legislature.

There are many other cases in the same and other states wherein the courts have examined, as a judicial question, the enactment of amendments to state constitutions. Some of the additional cases include Loring v. Yound, 239 Mass. 349, 132 N.E. 65 (1921); State v. Powell, 77 Miss. 543, 27 So. 927 (1900); Durfee v. Harper, 22 Mon. 354, 56 P. 582 (1899); State v. Babcock 17 Neb. 188, 22 N.W. 372

(1885); State v. Davis, 20 Nev. 220, 19 P. 894 (1888); State v. Foraker, 46 Ohio St. 677, 23 N.E. 491 (1890); State v. State Board of Equalization, 107 Okl. 118, 230 P. 743 (1924); Kadderly v. Portland, 44 Ore. 118, 74 P. 710 (1903); Lovett v. Ferguson, 10 S.D. 44, 71 N.W. 765 (1897); Cudihee v. Phelps, 76 Wash. 314, 136 P. 367 (1913); and State v. Marcus, 160 Wis. 354, 152 N.W. 419 (1915). Clearly, these state courts have found that they have the constitutional power to review questions concerning the enactment of amendments and they have found that such questions are judicially manageable.

II. The principle of legislative concurrence requires all legislative bodies involved in the enactment of

legislation to agree upon the same, precise, indentical piece of legislation.

One of the best examples of this principles is the case of Moog v. Randolph, 77 Ala. 597 (1884). In this case, the Alabama legislature had passed a certain bill, but the bill presented to and signed by the Governor did not contain a phrase which was inserted into that same bill by amendment. In striking the entire purported law, the Alabama Supreme Court stated:

> "Let us suppose, for illustration, that the bill in its complete form, as it passed the two houses, had been signed by the presiding officers of these respective bodies, and had been presented to the Governor for his approval, and he had drawn his pen through this same amendment, and, after thus expunging it, had approved the

> residue of the measure, this being done as a condition precedent to affixing his signature. Would there not exist, is such a case, precisely the same difference in fact between the bill passed and that approved, as is here presented? The part expunged in the one case, and the part omitted in the other, being indentical, the identity of the remainder is axiomatic. Could anyone seriously contend, that the approval of a part of a measure, however honestly done in the conviction of its propriety, would operate to give any legal force to the part thus approved? And yet, where is the difference, in practical effect, between the two cases? The clear logic of the case lies in the axiom, that a bill is an entirety, and a law is the product of the combined, harmonious and unanimous action of the legislative and executive departments of government, each acting strictly within the scope of its constitutional authority, and according to the prescribed forms of the constitutional mandate", 77 Ala. at 600.

It has been a frequent enough occurrence for legislative bodies to fail to concur with each other on a

given piece of legislation that a substantial body of case law exists to demonstrate this principle. In Rogers v. State, 72 Ark. 565, 82 S.W. 169 (1904), the Arkansas House adopted a bill which minorly varied from a similar bill adopted by the Arkansas Senate; the court found that there was no law. In State v. Skaley, 108 Fla. 506, 146 So. 544 (1933), the Florida Senate adopted a bill which used the word, "podiatry," while the House adopted a bill which used the word, "pediatry." The court held that there was no law. Other cases include Hillsborough County v. Temple Terrace Assets Co., 111 Fla. 368, 149 So. 473 (1933) and State v. City of Sanford, 113 Fla. 750, 152 So. 193 (1934).

This principle applies in

Illinois as demonstrated by the case of People v. Lueders, 283 Ill. 287, 119 N.E. 339 (1918), as do the cases of State v. Laiche, 105 La. 84, 29 So. 700 (1901), County Commissioners of Washington County v. Baker, 141 Md. 623, 119 A. 461 (1922), and Carnegie Institute of Medical Laboratory Technique, Inc. v. Approving Authority For Schools For Training Medical Laboratory Technologists, 213 N.E. 2d 225 (Mass., 1965), for the States of Louisiana, Maryland, and Massachusetts.

The same rule applies in Michigan and Nebraska; see Rode v. Phelps, 80 Mich. 598, 45 N.W. 493 (1890), State v. McCelland, 18 Neb. 236, 25 N.W. 77 (1885), and Moore v. Neece, 80 Neb. 600, 114 N.W. 767 (1908). The cases

of In re Jaegle, 83 N.J.L. 313, 85 A. 214 (1912), and In re Kornbluh, 134 N.J.L. 529, 49 A.2d 255 (1946), show that the courts in New Jersey follow this rule.

This principle also has application in other states; it applies in Oregon as demonstrated by Oregon Business and Tax Research, Inc. v. Farrell, 176 Ore. 532, 159 P. 2d 822 (1945). And courts in Tennessee, Wisconsin and Wyoming strike laws where it is shown there is no concurrence between the bodies involved in the enactment of legislation; see Fuqua v. Davidson County, 189 Tenn. 645, 227 S.W.2d 12 (1950), State v. Wendler, 94 Wis. 369, 68 N.W. 759 (1896), and State v. Swan, 7 Wy. 166, 51 P. 209 (1897).

The principle of concurrence applies to legislation at the federal level and both houses of Congress must completely agree upon any given bill before it may become a law. Further, when Congress proposes a constitutional amendment and submits the same to the states for ratification, the states must adopt precisely what Congress so proposed. If any state changes or amends the amendment proposed by Congress, it cannot be considered as a state which ratified the amendment.

III. The question of whether or not an amendment to the U.S. Constitution was adopted is a judicial question, especially when fraud in the ratification of that amendment is alleged and proven.

Almost from the very beginning of this nation after the American Revolution, this Court has considered the performance of ministerial tasks by public officials as reviewable by this Court. In Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), Secretary of State James Madison refused to perform the ministerial task of granting Marbury a Justice of the Peace Commission. Here, the Court reviewed Madison's action and compelled his performance. This case commenced a long line of cases wherein the performance of ministerial acts of public servants was reviewed; see Kendall v. United States 37 U.S. (12 Pet.) 524 (1838); Butterworth v. Hoe, 112 U.S. 50, 5 S.Ct. 25 (1884); United States v. Schurz 102 U.S. 378 (1880);

Nobel v. Union River Logging R. Co. 147 U.S. 165, 13 S.Ct. 271 (1893); and American School of Magnetic Healing v. McAnnulty, 187 U.S. 94, 23 S.Ct. 33 (1902).

In reference to the performance of discretionary acts by public officials, the Court in the past refused to engage in such review; see Mississippi v. Johnson 71 U.S. (4 Wall.) 475 (1866). However, today, with the Administrative Procedure Act, 5 U.S.C., Section 702, this Court will review the performance of discretionary; see Kent v. Dulles, 357 U.S. 116, 78 S.Ct. 1113 (1958).

When the question concerning whether or not a law existed was first presented to this Court, it held that such a question was a judicial one;

see Gardner v. Collector 73 U.S. (6 Wall.) 499 (1868), and Town of South Ottawa v. Perkins, 94 U.S. 260 (1877). But later, when a challenge was made that an enrolled bill in the possession of the Secretary of State was not the bill actually passed by Congress, this Court, in Field v. Clark, 143 U.S. 649, 12 S.Ct. 495 (1892), held that it would follow the "enrolled bill rule"; this meant that such enrolled acts which were signed by the President of the Senate, Speaker of the House, and the President of the United States were considered to be the valid laws passed by Congress. But, no sooner than when the decision was rendered in this case, this Court made an exception to this rule and permitted a review of

the vote in both houses of Congress to determine whether a bill was adopted by a quorum of each house; see United States v. Ballin, 144 U.S. 1, 12 S.Ct. 507 (1892), which was decided the same day as Field. And later, when the Eighteenth Amendment's ratification was challenged, this Court again looked to the vote in each house of Congress to see if the constitutional quorum for the proposal of an amendment was met; see Rhode Island v. Palmer (The National Prohibition Cases), 253 U.S. 350, 40 S.Ct. 486 (1920).

Article V of the U.S. Constitution deals with the enactment of amendments to the U.S. Constitution. This Article provides that Congress may propose amendments

and then submit the same to the he state legislatures for ratification. Whenever three fourths of such state legislatures shall ratify the amendment, the same shall become a part of the Constitution. This Article is completely silent as to how it shall be determined that an amendment was so adopted: such decision is not committed to either the executive or legislative branches of the national government. Can any branch assert the right that it, and it alone, can make a determination as to whether an amendment has been adopted: True, the legislative or executive branch can declare, as can any American citizen, that an amendment was or was not ratified, but such is not binding upon the nation as

a whole. The Constitution declares that an amendment is a part of it "when ratified." Ratification of an amendment is an event which is provable by evidence and argument. And the only place in our nation where evidence and argument are presented to prove or disprove the happening of an event, including fraud, is in the judiciary.

One case dealing with the Eighteenth Amendment concerned when that amendment became effective. In Dillon v. Gloss, 256 U.S. 368, 41 S.Ct. 510 (1921), the issue concerned a crime committed between the time that the Eighteenth Amendment was ratified and its certification by the Secretary of State. This Court held that an amendment became a part of the

Constitution "when ratified" by the states; it also held that the Secretary, when proclaiming the adoption of an amendment, was performing a ministerial act. Thus, the decision in Dillon clearly shows that the performance of the Secretary of State when he proclaims the adoption of an amendment is reviewable, since his act was held to be a ministerial act which has always been subject to review. And, since the Court held that an amendment is effective "when ratified," it left open the question of whether and when an amendment has been so ratified.

A year later, this Court was faced with another question regarding the ratification of the Nineteenth Amendment. In Leser v. Garnett, 258

U.S. 130, 42 S.Ct. 217 (1922), this Court held that the proclamation of the Secretary of the adoption of an amendment is conclusive upon the Courts. However, this opinion must be read in the light of the well established legal maxim that the courts will review the performance of ministerial acts, and thus the Secretary's act of proclamation, being ministerial, is reviewable in a proper case. Leser, therefore, stands forthe proposition that if an amendment has really and truly been ratified, the proclamation of the Secretary is sufficient. But, if the amendment was not really and truly ratified, and if the Secretary committed an unlawful or fraudulent act by proclaiming ratification, then

the adoption of the amendment must be open to examination by the Court.

Thus, the question involved in Ferguson's case is dependent upon the proper construction of both Dillon and Leser. The later case has only a limited application; if the amendment really is adopted, then the Secretary's proclamation is effective. But, if the Secretary's performance of his ministerial act of proclaiming the ratification of an amendment is challenged, then the question presented is a judicial one plainly reviewable in the courts.

IV. Section 205 of the Revised Statutes is unconstitutional as an unlawful delegation of legislative power to an executive official and is further unconstitutional on separation

of powers grounds.

The act of proclaiming the passage or adoption of legislation is a legislative power, and Congress cannot delegate a legislative power to anyone as such power is vested in Congress and Congress alone by the Constitution: see Field v.. Clark, 143 U.S. 649, 12 S.Ct. 495 (1892). All Congressional legislation must have an enacting clause and effective date and Congress alone can determine the effective date. This power of determining the effective date cannot be delegated as is the case with any other legislative power of Congress; see Panama Refining Co. v. Ryan, 293 U.S. 388, 55 S.Ct. 241 (1935); Schecter Poultry Corp. v. United States, 295 U.S. 495, 55 S.Ct. 837

(1935); and Carter v. Carter Coal Co., 298 U.S. 238, 56 S.Ct. 855 (1936).

Determining when or if an amendment to the constitution has been ratified is a legislative power. But, Section 205 of the Revised Statutes conferred upon the Secretary of State this vital legislative power, and, as such, this section is unconstitutional.

The further defect of Section 205 is the commingling of legislative and executive powers. Assuming, for argument purposes, that the entire process of the ratification of an amendment is vested solely in the hands of Congress, then only Congress can proclaim the ratification of an amendment. But, without this assumption, like the Congressional

determination of the effective date of ordinary legislation, only Congress can declare the effective date of an amendment. However, Section 205 permitted an executive branch official, the Secretary of State, to determine if and when an amendment was ratified, and he was thus empowered to determine the effective date of an amendment.

In Bowsher v. Synar, 54 Law Week 5064 (U.S. S.Ct., July 7, 1986), this Court demonstrated the continued vitality of the separation of powers doctrine. This Court held in Bowsher that a legislative officer could not exercise executive department powers. A necessary corollary to this proposition is that executive officers cannot exercise legislative powers.

Review of Section 205 and analysis of the powers conferred by this law to the Secretary of State plainly shows that he, as an executive official, was exercising legislative powers. Such being the case, Section 205 is unconstitutional.

CONCLUSION

In July, 1909, Congress proposed the Sixteenth Amendment to the states for ratification. This carefully worded amendment composed of 30 precise words attempted to confer an extremely important power of taxation upon Congress, one permitting the imposition of a direct tax without being subject to apportionment. However, as noted previously, this amendment was not adopted by 36 states.

Knox knew of the problems concerning the ratification of the Sixteenth Amendment. Notwithstanding knowledge of the above, Knox proceeded, on February 25, 1913, to proclaim that thirty-eight states, including all of the above states, had, in fact really and truly ratified the Sixteenth Amendment. The truth is that less than thirty-six states, three fourths of the states then in the Union, ratified this proposed amendment. But Knox, a lawyer, former U.S. Attorney General, former Senator from the State of Pennsylvania, and at that time, Secretary of State, understood to commit a fraudulent and unlawful act by proclaiming ratification of the challenged amendment.

The United States Supreme Court, the final authority in this nation on matters of law, and guardian of the liberties of the American people, should review this matter of an amendment which presently exists against the peace and dignity of this nation. The Petition For Writ of Certiorari must therefore be granted.

Respectfully submitted,

Lowell H. Becraft, Jr.
209 Lincoln Street
Huntsville, Alabama 35801
205-533-2535
Attorney for
Jane R. Ferguson

APPENDIX A

UNITED STATES of America
Plaintiff-Appellee

v.

Jane R. FERGUSON,
Defendant-Appellant.

No. 85-1688.

United States Court of Appeals
Seventh Circuit.

Argued Dec. 3, 1985.

Decided June 12, 1986.

Defendant/taxpayer was convicted on three counts of failure to file tax return, two counts of supplying false and fraudulent statements claiming to be exempt from federal income taxes, and three counts of making false claims for income tax refunds in the United States District Court for the Southern District of Indiana, Indianapolis Division, 615 F.Supp. 8,

James E. Noland, Chief Judge. Defendant appealed. The Court of Appeals, Grant, Senior District Judge, sitting by designation, held that: (1) Government established taxpayer's willfulness as to counts of failing to file tax return and supplying false and fraudulent statements claiming to be exempt from federal income taxes, in that Government introduced evidence which established taxpayer's knowledge of her duty to file proper returns and forms, taxpayer's "Affidavits of Revocation" stated that she was not required to file forms or pay taxes, thus showing her intent to violate her duty to file, and taxpayer's letter stated that income was not wages and she would continue to file exempt W-4 forms, and (2) because taxpayer's

characterization of tax collected in 1980 and 1981 as "excise tax" which was not owed was patently false and utterly groundless, taxpayer violated statute prohibiting making false claims for income tax refunds.

Affirmed.

1. Internal Revenue 5250

Government need not show bad faith on part of defendant under tax crimes statutes. 26 U.S.C.A. §§ 7203, 7205.

2. Internal Revenue 5294

Government may show willfulness in violation of tax crime statutes by presenting defendant's properly filed income tax returns or W-4 forms from prior years. 26 U.S.C.A. §§ 7203, 7205.

3. Internal Revenue 5300

Government established taxpayer's willfulness as to counts of failing to file tax return and supplying false and fraudulent statements claiming to be exempt from federal income taxes, in that Government introduced evidence which established taxpayer's knowledge of her duty to file proper returns and forms, taxpayer's "Affidavits of Revocation" stated that she was not required to file forms or pay taxes, thus showing her intent to violate her duty to file, and taxpayer's letter stated that income was not wages and she would continue to file exempt W-4 forms. 26 U.S.C.A. §§ 7203, 7205.

4. Internal Revenue 5205

In order to prove violation of making false claims for income tax refunds, Government need not prove that defendant acted "willfully." 18 U.S.C.a. § 287.

5. Internal Revenue 5250

Because taxpayer's characterization of tax collected in 1980 and 1981 as "excise tax" which was not owed was patently false and utterly groundless, taxpayer violated statute prohibiting making false claims for income tax refunds. 18 U.S.C.A. § 287.

6. Constitutional Law 10

Sixteenth Amendment to Constitution was not improperly ratified. U.S.C.A. Const. Amend. 16.

Lowell H. Becraft, Jr., Huntsville, Ala., for defendant-appellant.

Roger L. Duncan, Asst. U.S. Atty., John D. Tinder, U.S. Atty., Indianapolis, Ind., for plaintiff-appellee.

Before: EASTERBROOK, Circuit Judge, ESCHBACH, Senior Circuit Judge, and GRANT, Senior District Judge.*

GRANT, Senior District Judge.

Defendant-appellant challenges her conviction, after a bench trial, on three counts of failure to file a tax return in violation of 26 U.S.C.

---

*The Honorable Robert A. Grant, Senior District Judge for the Northern District of Indiana, is sitting by designation.

§ 7203, on two counts of supplying false and fraudulent statements claiming to be exempt from federal income taxes in violation of 26 U.S.C. § 7205(a), and on three counts of making false claims for income tax refunds in violation of 18 U.S.C. § 287. Defendant-appellant received one year's imprisonment for one of the false claim for refund counts and a fine of $5,000. The district court, 615 F.Supp. 8, suspended sentencing on the remaining false claim for refund counts and placed defendant-appellant on probation for five years. Defendant-appellant received a sentence of one year's imprisonment on each of the failure to file counts to run concurrently with the other one year's sentence. The district court

also ordered defendant-appellant to pay all federal and state taxes due and owing.

On appeal, defendant-appellant contends that she did not act willfully when violating the Internal Revenue Code, and that she did not know her refund claims were false. She also asserts that the Government may not legally tax income because the sixteenth amendment was never properly ratified. We affirm her conviction.

Facts

Defendant-appellant, Ferguson, and Charles M. Ferguson filed joint income tax returns for the years 1977, 1978 and 1979. During 1980, 1981 and 1982, Ferguson worked for the Delco-Remy Division of General Motors Corporation and received taxable

income. In each of those years, her employer withheld for federal income tax purposes a portion of the total tax owed to the Internal Revenue Service [hereinafter referred to as IRS]. Because Ferguson failed to file income tax returns for 1980, 1981 and 1982, she never paid the tax owed above the amount which was withheld.

In lieu of the returns she ought to have filed, Ferguson sent the IRS Affidavits of Revocation. Each Affidavit stated that she had mistakenly submitted herself to the jurisdiction of the IRS and that, after extensive research and consultation with counsel, she had found that she was not required to pay tax or file returns. The documents also denied that the IRS or any

governmental agency had jurisdiction over her with respect to the filing or payment of taxes. The documents concluded that Ferguson was not and is not required to file returns or pay taxes.

On January 8, 1981, the IRS received a "Eugene J. May" copyrighted 1040X form from Ferguson. A 1040X form is an Amended United States Individual Income Tax Return. In sum, the "Eugene J. May" 1040X form stated that wages are not income and it sought a refund for taxes paid by Ferguson in 1979 in the amount of

---

1. Privately printed and distributed, the "Eugene J. May" form closely resembles official IRS forms. "Eugene J. May" forms, however, contain margin and line captions differing from those found on standard IRS forms. In general these changes

$10,165. Ferguson also sought refunds of the taxes withheld by Delco-Remy in 1980 and 1981 by filing IRS forms 843. On these forms, she stated that the amount of tax collected in the corresponding years "was collected illegally/erroneously as an income tax. Said tax is an excise tax and is not owed to the Internal Revenue

---

reflect May's groundless assertion that "money received as a result of labor is not income within the meaning of the Sixteenth Amendment to the United States Constitution or the Internal Revenue Code. United States v. May, 555F.Supp. 1008, 1009 (E.D.Mich..1983). Such forms have become a familiar phenomenon in tax protestor cases. Se Weller v. Commissioner, 1985 Tax Ct.Mem.Dec. (P-H) ¶ 85, 387 (Aug. 5, 1985); see also Unroe v. Commissioner, [1984] 53 Tax Ct. Mem. Dec. (P-H) ¶83,287 (May 24, 1984). The IRS was granted an injunction enjoining May from distributing forms which differ in any respect from, the official 1040 form. May, 555 F.Supp. 1008.

Service". Form 843, Government Exhibits 7 and 8.

In 1980, 1981, 1982 and 1983, Ferguson filed W-4 forms, Employee's Withholding Allowance Certificates, which stated that she was exempt from taxes. In December 1982, Ferguson wrote the IRS to clarify their "misunderstanding" about her exempt status. The letter contended that the income tax is voluntary and that wages are not income.

The letter stressed that Ferguson would no longer consider the Internal Revenue Code legal because it was not properly enacted.

I.

[1-3] 26 U.S.C. §§ 7203 and 7205 required that a defendant act willfully when violating their

provisions. "'Willful in the tax crime statutes means a voluntary, intentional violation of a known legal duty....'" United States v. Green, 757 F.2d 116, 123 (7th Cir.1985) (quoting United States v. Pomponio, 429 U.S. 10, 13, 97 S.Ct. 22, 24, 50 L.Ed.2d 12 (1976)); see United States v. Quilty, 541 F.2d 172, 176 (7th Cir.1976). The Government need not show bad faith on the part of a defendant under the tax crime statutes. Green, 757 F.2d at 123. The Government may show willfulness by presenting a defendant's properly filed income tax returns or W-4 forms from prior years. United States v. Scrlin, 707 F.2d 953, 959 (7th Cir.1983); United States v. Moore, 627 F.2d 830, 832 (7th Cir.1980), cert. denied, 450 U.S. 916,

101 S.Ct. 1360, 67 L.Ed.2d 342 (1981). In the instant case, the Government introduced such evidence and it establishes Ferguson's knowledge of her duty to file proper income tax returns and W-4 forms. Ferguson's Affidavits of Revocation stated that Ferguson is not required to file income tax forms or to pay taxes. This shows her intent to violate her duty to file. Ferguson's December 1982 letter to the IRS stated that income is not wages and that she would continue to file exempt W-4 forms. This shows her intent to file the false and fraudulent withholding forms. We conclude that the Government established Ferguson's willfulness.

II.

[4] Under 18 U.S.C. § 287, the Government must prove that a defendant made a claim upon the United States knowing that the claim was false. The Government need not prove that the defendant acted "willfully." United States v. Blecker, 657 F.2d 629, 634 (4th Cir.1981) (§ 287 does not require a showing of specific intent to defraud the government), cert. denied, 454 U.S. 1150, 102 S.Ct. 1016, 71 L.Ed.2d 304 (1982); United States v. Irwin, 654 F.2d 671, 680-82 (10th Cir.1981), cert. denied, 455 U.S. 1016, 102 S.Ct. 1709, 72 L.Ed.2d 133 (1982).

[5] Ferguson filed a "Eugene J. May" 1040X form seeking a refund of the taxes she paid in 1979 and

submitted form 843 claims for refunds for taxes withheld by her employer during 1980 and 1981. These forms on their faces demonstrate Ferguson's knowledge of the falsity of her claims. First, the "Eugene J. May' form reflects the filer's efforts to gain a refund through her groundless interpretation of the tax laws. See discussion, supra, note 1. Second, the claims on form 843 state that the tax collected in 1980 and 1981 was an excise tax which was not owed. During the years in question, the law did not require Ferguson to pay an excise tax. The taxes levied upon Ferguson during 1980 and 1981 was an excise tax which was not owed. During the years in question, the law did not require Ferguson to pay an excise tax. The

taxes levied upon Ferguson during 1980 and 1981 clearly constituted an income tax authorized by the sixteenth amendment to the constitution. Because her characterization was patently false and utterly groundless, she violated 18 U.S.C. § 287.

III.

[6] Ferguson invites our review of the validity of the ratification of the sixteenth amendment. Two recent panels of this Court have considered the arguments and evidence presented by Ferguson in the instant appeal. See United States v. Thomas, 788 F.2d 1250, 1253 (7th Cir.1986); United States v. Foster, 789 F.2d 457, 461-63 (7th Cir.1986). Because those two opinions analyze Ferguson's present claim and find it to be lacking, we,

for the reasons stated in Thomas and Foster, reject Ferguson's contention that the amendment was improperly ratified.

Conclusion

This Court AFFIRMS Ferguson's conviction.

APPENDIX B

UNITED STATES of America, Plaintiff,

v.

Jane R. FERGUSON, Defendant.

Cause No. 1P 84-100-CR.

United States District Court,
S.D. Indiana,
Indianapolis Division.

Feb. 12, 1985.

In prosecution for violation of federal tax laws, the District Court, Noland, Chief Judge, held that: (1) evidence was sufficient to establish that defendant willfully failed to file tax returns; (2) evidence, including withholding statements defendant supplied employer stating that defendant supplied employer stating that defendant was exempt from income tax withholding, was sufficient to establish that defendant willfully

disregarded her obligation to pay taxes and to have tax withheld from her earnings; and (3) evidence was sufficient to establish that defendant violated statute which proscribes filing of false claims upon or against the United States, or any department or agency thereof.

Order accordingly.

1. Internal Revenue--5215

"Willfully" under 26 U.S.C.A. § 7203, which proscribes willful failure to file tax return, means a voluntary, intentional violation of a known legal duty.

See publication Words and Phrases for other judicial constructions and definitions.

2. Internal Revenue--5235

Government may establish willful violation of 26 U.S.C.A. § 7203, which

proscribes willful failure to file tax return, by circumstantial evidence alone.

3. Internal Revenue--5235

Evidence that defendant earned over $20,000 per year for three years in question, that defendant filed affidavits stating that she was not required to file or pay tax because she was not a corporation and had not been granted any special privileges by the government, and that defendant had filed joint returns with her husband for previous years was sufficient to establish beyond reasonable doubt that defendant willfully failed to file tax returns in violation of 26 U.S.C.A. § 7203.

4. Internal Revenue--5235

Evidence, including withholding

statements defendant supplied employer stating that defendant was exempt from income tax withholding, exhibits showing that defendant had been earning income during relevant time periods, and another exhibit showing that defendant did not consider the Internal Revenue Code legal, was sufficient to establish that defendant willfully disregarded her obligation to pay taxes and to have tax withheld from her earnings in violation of 26 U.S.C.A. § 7205.

5. United States--121

Form 1040X and Claim Form 843 submitted by defendant seeking refund of income taxes collected were claims made by defendant upon an agency of the United States, i.e., the Internal Revenue Service, within meaning of 18

U.S.C.A. § 287, which proscribes filing of fraudulent claims against the United States.

6. United States --123

Evidence that defendant was attempting to avoid paying any money in income taxes, that she submitted false claims for refunds in furtherance of her plan, and that she believed that income tax laws were invalid or that income tax withheld from her wages had been collected illegally and erroneously was sufficient to establish that defendant violated 18 U.S.C.A. § 287, which proscribes filing of false claims upon or against the United States, or any department or agency thereof.

Robert Duncan, Asst. U.S. Atty.,

Indianapolis, Ind., for plaintiff.

Lowell H. Beecraft, Huntsville, Ala., for defendant.

MEMORANDUM OF DECISION AND

FINDING OF GUILTY

NOLAND, Chief Judge.

On November 14, 1984, the Grand Jury returned an eight count indictment against defendant, Jane R. Ferguson. Counts one through three allege that defendant willfully and knowingly failed to file an income tax return for the years 1980, 1981, and 1982. Counts four and five allege that defendant willfully supplied false and fraudulent statements claiming to be exempt from withholding for federal income taxes. These statements were allegedly submitted in 1982 and 1983. Counts six through eight allege that defendant knowingly filed fraudulent claims against the United States on three occasions, once

a voluntary, intentional violation of a known legal duty. United States v. Moore, 627 F.2d 830 (7th Cir. 1980), cert. denied, 450 U.S. 916, 101 S.Ct. 1360, 67 L.Ed.2d 342 (1981). The government may establish a willful violation by circumstantial evidence alone. United States v. MacLeod, 436 F.2d 947 (8th Cir.), cert. denied, 402 U.S. 907, 91 S.Ct. 1378, 28 L.Ed.2d 647 (1971).

[3] Defendant, in support of her motion for acquittal, argues that the government failed to prove defendant acted willfully. Defendant contends the evidence introduced at trial established only a civil tax liability and not that defendant acted willfully. The Court finds, however, that the government carried its burden

of proving the violation of 26 U.S.C. § 7203.

Government's exhibit 35 consists of the record of income earned by defendant while an employee of the Delco-Remy Division of General Motors in Anderson Indiana. The exhibit, along with the attached wage and tax statement, shows that defendant earned $20,858.12 in 1980. Government's exhibit 36, also a record of defendant's earnings, establishes that defendant earned $24,644.32 in 1981. Government's exhibit 37 shows that defendant earned $27,205.53 in 1982. The government thus proved that defendant was required to file a return in each of the years in question, since defendant had sufficient gross income to necessitate

filing a return. See 26 U.S.C. § 6012.

In support of the second element the government offered the testimony of Beatrice Cox and, in addition, government's exhibits 4 and 5. Cox testified that exhibits 4 and 5 were account transcripts of defendant kept by the Internal Revenue Service. Cox stated these transcripts revealed that defendant did not file a return in 1980, 1981, and 1982. In addition to this evidence the government introduced exhibits 50 through 54. These exhibits are all entitled "Affidavit of Revocation" and are signed by defendant. Each affidavit states that defendant is "not required to file or pay a tax" because defendant was not a corporation and

had not "been granted any special privileges by the government, which would make me liable for any income tax." These exhibits are further evidence that defendant did not file a return during the years in question. The Court finds that the government has established the failure to file a return in 1980, 1981, and 1982. Thus, the second element of the offense has been proved.

The government must not show that the failure to file was willful. In order to establish this the government introduced exhibits 1, 2, and 3. These exhibits were joint returns filed by defendant and her husband in 1977, 1978, and 1979. The Seventh Circuit has previously held that, in a prosecution for failure to file a tax

in 1981 and twice in 1983.

Trial on this matter began on January 14, 1985. At this time defendant, in open court, waived her right to have the case decided by jury. The Court, after fully explaining to defendant her absolute right to a jury trial, accepted defendant's waiver and proceeded to trial without a jury. The government concluded its case on January 16, 1985, after which the defendant moved for acquittal. The Court over ruled the motion, and defendant rested without calling any witnesses or presenting any evidence.

The Court now finds, for the reasons set forth below, that defendant is guilty on all counts of the indictment.

COUNTS 1-3

[1,2] Counts one through three allege that defendant willfully and knowingly failed to make an income tax return for the years 1980, 1981, and 1982, in violation of 26 U.S.C. § 7203. Section 7203, in pertinent part, states that "[a]ny person required under this title ... by law or regulation to make a return ... who willfully fails to make such a return ... shall be guilty of a misdemeanor." To establish a conviction the government must prove that defendant was required to file a return, that defendant failed to make a return, and that defendant's failure was willful. United States v. Grabinski, 558 F.Supp. 1324 (D.C. Minn. 1983). Willfully in tax crime statutes means

return, earlier returns can be used to show willfulness. United States v. Moore, supra; United States v. Farris, 517 F.2d 226 (7th Cir. 1975). The Court finds that the fact defendant had previously filed income tax returns demonstrates she knew of her duty to file in 1980, 1981, and 1982, but willfully failed to do so. Additional exhibits introduced by the government show that defendant did not consider the Internal Revenue Codes "legal" since they were "not duly constituted laws enacted or in agreement with the United States Constitution." (Government's exhibit 56.) Defendant's belief in the invalidity of the tax laws further strengthens the government's contention that defendant acted

willfully and not just accidentally, inadvertently, or negligently. **

In view of the foregoing, it is clear beyond a reasonable doubt that defendant willfully failed to file a return in 1980, 1981, and 1982, in violation of 26 U.S.C. § 7203.

COUNTS 4 & 5

[4] Counts four and five of the indictment allege that defendant willfully supplied false and fraudulent statements to her employer, Delco-Remy, in which she claimed to be exempt from withholding for federal

---

1/ It is well settled that even a good-faith disagreement with the tax law does not negate willfulness. United States v. Kraeger, 711 F.2d 6 (2nd Cir. 1983); United States v. Moore, supra; United States v. Karsky, 610 F.2d 548 (8th Cir. 1979), cert. denied, 444 U.S. 1092, 100 S.Ct. 1058, 62 L.Ed.2d 781 (1980).

income taxes. The indictment alleges defendant submitted the false withholding statements in 1982 and 1983.

26 U.S.C. § 7205(a) states:

> Any individual required to supply information to his employer under section 3402 who willfully supplies false or fraudulent information, or who willfully fails to supply information thereunder which would require an increase in the tax to be withheld under section 3402, shall, in lieu of any other penalty provided by law (except the penalty provided by section 6682), upon conviction thereof, be fined not more than $1,000, or imprisoned not more than 1 year, or both.

To establish a violation of this section the government must show that defendant was an employee, that defendant supplied false or fraudulent information, and that she acted willfully, United States v. Herzog,

632 F.2d 469 (5th Cir. 1980), reh. denied, 636 F.2d 315 (1981). As under section 7203, willfully means a voluntary, intentional violation of a known legal duty.

Government's exhibit 41 is defendant's employment record from Delco-Remy. This exhibit shows that defendant was employed by Delco-Remy from 1981 through 1984. Defendant stipulated to the admission of this document and also stipulated that only one "Jane R. Ferguson" worked at Delco-Remy during the time in question. Thus, there is no dispute that defendant was an employee.

The government introduced several exhibits to establish that defendant supplied false or fraudulent information. Government's exhibits

33 and 34 withholding certificates signed by defendant on January 12, 1982 (exhibit 33) and January 3,1983 (exhibit 34) both state that defendant is exempt from income tax withholding. As proof that these certificates were false or fraudulent, the government introduced exhibit 41, which showed that from 1981 to 1982 defendant earned from $10.29 to $11.09 per hour. Exhibit 41 also showed that from 1982 to 1984 defendant earned from $9.56 to $14.81 per hour. Therefore, since defendant had been earning income during the relevant time periods in counts four and five, defendant's claims of exemptions were clearly false.

The last element of a section 7205 violation is willfulness.

Defendant again contends the government failed to establish that defendant acted willfully. The Court finds, however, that much of what the government used to establish willfulness under section 7203 supports a showing of willfulness under section 7205. Defendant knew of her obligation to pay taxes and to have tax withheld from her earnings (see exhibits 1, 2, and 3, with attached wage and tax statements), but willfully chose to disregard those obligations, in large part because of her disagreement with federal income tax laws.

The government has sustained its burden of establishing the offenses

contained in counts four and five of the indictment.

COUNTS 6, 7 & 8

Counts six, seven, and eight of the indictment allege that defendant violated 18 U.S.C. § 287, which states:

> Whoever makes or presents to any person or officer in the civil, military, or naval service of the United States, or to any department or agency thereof, any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Specifically, count six alleges that in 1981 defendant presented a fraudulent Form 1040X to the Internal Revenue Service, in which she claimed that she had no adjusted gross income or federal tax liability in 1979.

(Government's exhibit 6.) Count seven alleges defendant submitted a fraudulent Claim Form 843 to the Internal Revenue Service in 1983. This form stated that tax collected during 1980 had been collected illegally and that Internal Revenue Service owed defendant a $903 refund. (Government's exhibit 7.) Count eight alleges that defendant submitted another fraudulent Claim Form 843 in 1983. This form requested a refund of $2,309. (Government's exhibit 8.)

[5,6] The Court finds that the government has established the offenses charged in counts six, seven, and eight. The documents constituting exhibits 6, 7, 8 are all claims made by defendant upon an agency of the United States, i.e., the Internal

Revenue Service. See generally United States v. Miller, 545 F.2d 1204 (9th Cir. 1976), cert. denied, 430 U.S. 930, 97 S.Ct. 1549, 51 L.Ed.2d 774 (1977) (false claims for refund sent to Internal Revenue Service could be prosecuted under 18 U.S.C. § 287.) The government has also shown that defendant knew the claims were false, fictitious, or fraudulent. As has previously been established, defendant knew of her obligation to pay taxes and had done so in the past. But beginning in 1980, defendant refused to pay taxes, claimed she was exempt from withholding, and filed for a refund of any amount that was withheld or paid. Government's exhibit 6 shows that defendant attempted to get a refund of $10,165, which was the

amount defendant paid in taxes in 1979 (see government's exhibit 3). Government's exhibit 7 shows that defendant requested a refund of $903, which was within eight cents of the amount withheld from defendant's wages in 1980 (see government's exhibit 58). Similarly, in government's exhibit 8 defendant claimed a refund of $2,309, which corresponds to the amount withheld from defendant's wages in 1981. The evidence submitted by the government indicates that defendant was attempting to avoid paying any money in income taxes, and that she knowingly submitted false claims in furtherance of her plan. Defendant's belief that income tax laws are invalid or that income tax withheld from her wages had been collected

"illegally/erroneously" does not excuse her deliberate attempts to avoid paying taxes. United States v. Moore, supra. Counts six, seven, and eight have been proved beyond a reasonable doubt.**

Accordingly, the government having proved beyond a reasonable doubt all of the offenses in the indictment, defendant Jane R. Ferguson is found guilty on all eight counts. Pursuant to Rule 23 of the Federal Rules of Criminal Procedure, the above memorandum constitutes the general

---

2/ The government correctly points out that there is a dispute as to whether materiality is an essential element of 18 U.S.C. § 287. Compare United States v.Irwin 654 F.2d 671 (10th Cir. 1981) (materiality not an element), with United States v. Pruitt, 702 F.2d 152 (8th Cir. 1983) (materiality is an element). The

findings of fact and conclusions of law. The Court orders that the probation service of this Court complete a presentence investigation of defendant within 21 days of this entry.

IT IS SO ORDERED.

Court in Pruitt defined materiality as whether the claim had a tendency to induce the government to act by placing the claimant in a position to obtain benefits from the government. If materiality is indeed an element of section 287, the court finds it has been established under the Pruitt test even though defendant never actually received the refunds.